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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. **153**

J. E. FARRELL, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

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To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 5, 1943.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (known as the Tax Court of The United States) (R. 26-45) is reported in 45 B. T. A. 162. The opinion of the Circuit Court of Appeals (R. 289-29) is reported in 134 F. (2d) 193.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 5, 1943 (R. 292). A timely petition for rehearing was denied on April 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The question presented in this case is whether the proceeds of certain oil runs accumulated in the years 1933, 1934, and 1935 were taxable to the petitioner in those respective years or in the year 1936.

STATUTE AND REGULATIONS INVOLVED.

The pertinent statutory provisions herein involved are contained in the Appendix.

SUMMARY STATEMENT OF THE MATTER HEREIN INVOLVED.

Petitioner, on March 11, 1931, with his then wife, Stella B. Farrell, owned as community property, one-half of a seven-eighths working interest in some 42 oil and gas leases in East Texas (R. 77). The other one-half was owned by four other individuals. (R. 77.)

On March 11, 1931, petitioner and the four individuals assigned to Yount-Lee Oil Company, a Texas Corporation, all of their interest in these leases. (R. 77, 130-137.) They received \$1,270,000 cash and reserved one-fourth of the oil produced under the working interest until they should have received a total of \$2,000,000 out of the production, free of all cost and expense to them. (R. 77-78, 137-9.) Payments were to be made on or before the 20th day of each month following the month in which the oil was produced and saved. (R. 139.)

On July 8, 1931, Stella B. Farrell filed suit in Texas for divorce from petitioner, praying for an inventory and appraisal and partition of the community property. (R. 78, 142-3.) On the same date, petitioner and Stella entered into a written agreement providing that in lieu of a partition of the community estate, petitioner should pay Stella \$750 per month for life, and she agreed to transfer and convey to petitioner her share of the community estate. (R. 78, 145-8.) On August 8, 1931, Stella was granted an ab-

solute divorce and the decree provided that her share of the community estate be recovered by Farrell and that it should become his sole and separate property. (R. 78, 144-5.) Four days later Stella married Albert L. Burguières. (R. 78.)

This settlement and decree was confirmed by sealed instruments of release and conveyance executed by Mrs. Burguières, individually and with her new husband. (R. 79, 148-150.)

On July 5, 1933, Mrs. Burguières filed a suit in the Texas State Courts and made petitioner and Yount-Lee Oil Company defendants. (R. 79.) That suit was in the nature of a bill of review to set aside the property portion of the divorce decree and also to set aside all agreements and releases previously executed by Mrs. Burguières. As grounds the bill alleged fraudulent misrepresentations and concealment. (R. 150-173; 85 S. W. (2d) 960.)

The prayer in Mrs. Burguières' original bill was that she be declared to be the owner of an undivided one-half interest in the agreement of March 11, 1931; and of the proceeds already accrued and to accrue thereunder. (R. 151, 85 S. W. (2d) 960.) A temporary restraining order was obtained against petitioner and continued until hearing on the merits. (R. 151, 202, 203.)

In her final pleading, a second amended petition filed on May 5, 1934, Mrs. Burguières demanded a one-half interest in the oil payments due from Yount-Lee and, with respect to the other half, she asked for a lien to secure any *personal judgment* that she might recover against Farrell for waste or depreciation in value of the community estate. (R. 173.)

After trial, on June 8, 1934, the Texas District Court directed a verdict for the defendants, (R. 80, 213) and the Court entered judgment for the defendants and ordered that all restraining orders and/or temporary injunctions that had not expired by the terms thereof should be set aside and annulled. (R. 80, 215.)

On September 21, 1934, Mrs. Burguières appealed to the Court of Civil Appeals of Texas. (R. 81; 216-217.) On

June 28, 1935, the Court of Civil Appeals unanimously affirmed the judgment of the District Court. (R. 81; 85 S. W. (2d) 952-978) and on September 6, 1935, overruled a motion for rehearing and to certify questions to the Supreme Court of Texas. (R. 81; 85 S. W. (2d) 978-980.) On October 5, 1935, Mrs. Burguières filed in the Supreme Court of Texas a petition for writ of error to the Court of Civil Appeals. (R. 82.) On November 6, 1935, the Supreme Court in a written opinion concluded that it was without jurisdiction to allow the writ¹ and accordingly dismissed the petition. (R. 82.)

On November 21, 1935, Mrs. Burguières filed in the Supreme Court of Texas a motion for leave to file petition for Mandamus to require the Court of Civil Appeals to certify questions in *Burguières v. Farrell*. That motion was denied, *per curiam*, and without opinion, on January 8, 1936. (R. 82.) On January 23, 1936, Mrs. Burguières followed this with a motion for rehearing which was overruled on March 11, 1936. (R. 82.)

After March 11, 1931, Yount-Lee worked the oil and gas leases, and rendered to petitioner regular monthly statements of crude oil runs and casinghead gas sold from these leases. (R. 82-83, 229-239, 93, 96.) It was the practice of Yount-Lee Oil Company to mail with the statement a check payable to petitioner covering his interest. (R. 231-239, 96.)

The last check mailed to petitioner before the Burguières litigation was on or about June 20, 1933. (R. 249, 96.) Thereafter Yount-Lee Oil Company suspended monthly payments but continued to render regularly each month detailed statements of the oil and gas runs for the preced-

¹ Art. 1821, R. C. S. of Texas, 1925, as amended provided:

“Judgment conclusive on law.—The judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to-wit:

* * * * *

“3. All cases of divorce.”

ing month and of Farrell's interest in the proceeds. (R. 83, 249-250, 93, 96.)

On its books and records, Yount-Lee posted these amounts to the credit of petitioner. (R. 241-242.) The amount thus accumulated for the account of petitioner up to August 1, 1935, was \$348,529.19. (R. 83.)

On July 31, 1935, Yount-Lee transferred to Stanolind Oil and Gas Company its interest in the oil and gas leases aforesaid, subject to the agreement of March 11, 1931. (R. 83.) At the same time, Yount-Lee deposited in escrow in the First National Bank of Houston the sum of \$1,267,951, to be paid out on the joint order of Wright Morrow¹ and of Stanolind Oil and Gas Company to various persons, among whom was petitioner. The amount provided for petitioner was \$348,904.75. (R. 83, 218-219.)

Beginning with August 1, 1935, the oil and gas leases in question were worked by Stanolind Oil and Gas Company which sold the oil and gas produced. (R. 84, 96.) Petitioner was furnished monthly statements similar to those previously furnished by Yount-Lee. (R. 93-96, 243-247.)

From August 1, 1935, to and including December 31, 1935, no payments were made to petitioner with respect to the oil and gas produced and sold, but the amount accumulated over that period was \$54,143.64. (R. 64.)

Subsequent to July, 1934, Yount-Lee held the proceeds for petitioner's account and benefit and as security for any *personal obligation* of petitioner that might be established against him by Mrs. Burguières in the pending litigation. (R. 96, 111-112, 116, 117, 121.) Upon demand by petitioner for said moneys, the Yount-Lee Oil Company declined payment. (R. 96, 97, 109, 116, 117, 121, 122.)

Subsequent to April 11, 1936, because they considered the Burguières litigation terminated, the Yount-Lee Oil Company, Stanolind Oil and Gas Company, and Wright Morrow directed payment of \$348,529.19 with respect to oil and gas

¹ Wright Morrow of Houston, Texas, had purchased all of the stock of Yount-Lee. (R. 112.)

sold or run by Yount-Lee Oil Company up to August 1, 1935. (R. 84, 121; of R. 35.)

On April 11, 1936, there was also paid to petitioner the sum of \$54,143.63 by Stanolind for oil and gas sold by it from August 1, 1935, to and including December 31, 1935. (R. 84.)

Of the aforesaid sums, the amounts attributable to oil and gas produced and sold in the respective years 1933, 1934 and 1935, were as follows (R. 85):

1933	\$80,661.64
1934	172,505.04
1935	149,506.15

Total	<u>\$402,672.83</u>
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The Commissioner treated the entire accumulations aggregating \$402,672.83 as income taxable to petitioner for the year 1936 and on that basis determined a deficiency of \$198,044.98. (R. 85, 21.) The Commissioner's determination was sustained by the Board of Tax Appeals. (R. 26-47.) On petition for review, the Circuit Court affirmed the Board's decision. (R. 289-292.) (J. Hutcheson concurred in the result only.)

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred as a matter of federal tax law in holding that whether the legal relationship of a group or joint venture existed within the meaning of the Revenue Acts was an "inference of fact" on which the Board's finding was conclusive if supported by substantial evidence.

2. The Circuit Court of Appeals erred in failing and refusing to hold that under the agreement of March 11, 1931, petitioner was a participant in a group or joint venture for the exploitation of the leases in question within the meaning of the Revenue Acts of 1934 and 1936.

3. The Circuit Court of Appeals erred in failing and refusing to hold that as a matter of law, petitioner owned at

least one-half of the oil and gas proceeds allocable to him under the agreement of March 11, 1931, which was never questioned at any time by Stella B. Burguieres in her suit against the petitioner, which constituted income to the petitioner in the year earned.

4. The Circuit Court of Appeals erred in failing and refusing to hold that to the extent and use of one-half of the proceeds allocable to petitioner under the agreement of March 11, 1931, as security for any personal obligations of petitioner, said use constituted the use and enjoyment of said proceeds for and by petitioner and rendered said proceeds taxable income in the year earned.

REASONS FOR ALLOWANCE OF WRIT.

I.

The question of whether a group or joint venture exists within the statutory definition of partnership is one of law and not of fact as held by the Circuit Court of Appeals. The Circuit Court opinion represents a serious departure from established law and operates to deprive petitioner of the judicial review to which he is entitled.

The holding of the Circuit Court of Appeals raises a serious question of statutory application of the term "group or joint venture" within the intent and meaning of the revenue laws. (Appendix.)

The Court held that "whether any such legal relationship existed between petitioner and Yount-Lee was an inference of fact * * *" and held itself bound by the Board's conclusion as supported by ample evidence. It made no independent analysis of this obvious legal conclusion.

The revenue acts since 1932, differently from previous acts, define the term "partnership" as including a group or joint venture, the taxation of which had formerly offered troublesome problems. The application of this statutory definition became and remains entirely a question of law and not of fact. *Lewis and Company v. Commissioner*, 301

U. S. 385. The interpretation and construction of the basic agreement of March 11, 1931, was also a question of law and not one of fact. 33 Corpus Juris, 845; *First Mechanics Bank v. Commissioner*, 91 F. (2d) 275, (C. C. A. 3). It is self-contradictory in terms to speak as the lower Court did, of a "legal relationship" as an inference of fact. In reality it is the application of a statutory provision properly interpreted to a given factual situation. There is no dispute here as to the facts—there is, however, a dispute as to the proper application of the statutory definitions to those facts. It is the primary function of a Circuit Court of Appeals to review the Board's decision in that regard and independently determine that legal relationship. This the lower Court has failed and refused to do and in so doing, has deprived petitioner of the only judicial determination of law questions which the statutes provide in Board of Tax Appeals (now Tax Court) cases. This presents a serious question in the administration and application of federal tax laws calling for the interposition of this Court to fix the scope of review in such cases.

II.

The Board of Tax Appeals found that Stella B. Burguières sued to recover only one-half interest in the proceeds. The Circuit Court of Appeals in failing to hold that ownership of the other one-half remained in petitioner and was constructively received by him, decided the case contrary to principles of taxation announced in previous opinions of this Court.

The Board found that Stella Burguières in the Texas suit sued for only one-half of her community interest in the proceeds from the sale of the oil in question. Title to the other half belonged at all times to petitioner even though Mrs. Burguières sought to charge it with an equitable lien to secure reimbursement for possible personal obligations of petitioner.

Since title to this one-half was not litigated it belonged to petitioner and the proceeds were constructively received by him for tax purposes upon accumulation prior to 1936. Under application of the doctrine in *Thomas v. Perkins*, 301 U. S. 655 and *Dearing v. Commissioner*, 102 F. (2d) 91 (C. C. A. 5th Cir.) this one-half may also be regarded as having been actually received by Farrell. The Circuit Court of Appeals in its opinion and decision entirely overlooked the one-half undisputed oil proceeds.

In its opinion the Circuit Court (R. 291) states that the ownership of oil and the extent to which it belonged to petitioner was conjectural until settled by final decree in 1936. The statement is plainly erroneous because—

1. Ownership of one-half of the oil payments was never claimed by Mrs. Burguières at any time;

2. The ownership of the whole had been judicially adjudicated in the original divorce action. Mrs. Burguières' later suit was simply a bill of review—such a bill may not in substance or in law be considered a litigation over ownership of the oil payment.

In a real sense this one-half represented economic gain to petitioner prior to 1936. As stated in *Helvering v. Horst*, 311 U. S. 112, 85 L. ed. 75 (p. 77):

“* * * But the decisions and regulations have consistently recognized that receipt in cash or property is not the only characteristic of realization of income to a taxpayer on the cash receipts basis. Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him. *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716; *Corliss v. Bowers*, 281 U. S. 376, Cf. *Burnet v. Wells*, 289 U. S. 670.

And as further stated by this Court in *Raybestos-Manhattan, Inc. v. U. S.*, 296 U. S. 60, 64, that

“* * * Income is not any the less taxable income of the taxpayer because by his command it is paid directly to another in performance of the taxpayer's obligation to that other. * * *”

The Court below therefore, in refusing to hold that Petitioner received one-half of the oil payments in question prior to 1936 raised an important question of federal taxation in respect of the scope of the constructive receipt principle, which should be decided by this Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its reviewing functions in order that the errors herein pointed out may be corrected, and the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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